

June 15, 2012

Phaedra A. Norton
156 S. Broadway, Suite 240 I
Turlock, CA 95380-5456

Re: Your Request for Informal Assistance
Our File No. I-12-091

Dear Ms. Norton:

This letter responds to your request for advice on behalf of Mayor Lazar regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because you do not seek advice regarding a specific decision or decisions, but refer instead to broad classes of decisions, we provide you with informal assistance.²

QUESTION

Under what circumstances might Mayor Lazar have a conflict of interest under the Act when making, participating in making, or using his official position to influence the land-use decisions you describe?

CONCLUSIONS

The circumstances under which Mayor Lazar might have a conflict of interest under the Act are described in our analysis below.

FACTS

The City of Turlock has hired a consultant to update the City's general plan and to prepare an Environmental Impact Report (EIR) for the updated general plan. The Mayor is a real estate agent in the City of Turlock. He has been employed as a realtor since 1988 and is currently with

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329(c).)

Century 21 M&M and Associates. The Mayor advises that his business is primarily resale home transactions; however, from time to time he has sold agricultural land and commercial properties.

As part of the General Plan update, the Mayor will be participating in making general land-use policy decisions. For example, the Mayor will be participating in making decisions on the following issues: (1) broad city-wide land-use policies including decisions on new growth areas; amount, type and location of growth; intensification of infill areas; and urban design policies; (2) service policies, which include decisions regarding level-of-service policies for police and fire; (3) infrastructure capacity and standards including water, sewer, storm drain, and transportation infrastructure, financing strategies, and development standards; (4) relationships between City and Regional or County planning and policies including annexation, growth management, and strategies on ensuring coordination of regional/county planning and city planning.

Persons represented by the Mayor in the past may appear before him during public hearings on the general plan and may advocate for or against a specific decision regarding general land-use policies, described in the previous paragraphs, including persons who have been a source of income aggregating more than \$500 to the Mayor over the past twelve (12) months. He may also participate in decisions affecting a specific property and that property's land use designation, either at the request of the property owner, or when the City on its own initiative considers a possible re-designation of a specific property.

In addition, the Mayor has or has had listed, and has sold, properties in the General Plan Areas of Interest, and you ask whether the Mayor would have a conflict of interest under the Act that would disqualify him from participating in or in making general land use policy decisions because he has or has had listed or sold properties in the general plan areas of interest.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Is Mayor Lazar a public official for purposes of the Act?

As Mayor of the City of Turlock, Mayor Lazar is a "public official" under the Act. (Section 82048.) Consequently, he may not make, participate in making, or otherwise use his official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests. (Regulations 18702.1-18702.4.)

Step Two: Will Mayor Lazar be making, participating in making, or using or attempting to use his official position to influence a governmental decision?

Your account of the facts presupposes that the Mayor will be making or participating in making governmental decisions. The Mayor may not make, participate in making, or otherwise use his official position to influence any such decisions that will have a reasonably foreseeable material financial effect on any of his economic interests. (Regulations 18702.1-18702.4.)

Step Three: What are Mayor Lazar's economic interests?

A public official has a financial interest within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

1. An economic interest in any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(a); Regulation 18703.1(a)); or in any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
2. An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
3. An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 18703(c); Regulation 18703.3.) "Income" includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. (Section 82030(a).)
4. An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
5. An economic interest in his or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18703.5.)

Source of Income

Mayor Lazar is a real estate agent with clients (and perhaps other persons) who possibly will have provided him with income (including promised income) of \$500 or more within 12 months prior to any governmental decision. These sources of income would constitute economic interests under the Act. (Section 87103(c); Regulation 18703.3.)³

³ We have not been told that the Mayor has economic interests (as that term is defined by the Act) in a business entity, real property, or a source of gifts potentially affected by the decisions at issue. Therefore our analysis does not consider those economic interests.

Regulation 18703.3(c) (copy enclosed) contains special disclosure and disqualification requirements applicable to any official who receives commission income for services rendered as a real estate agent. "Commission income" means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. (Reg. 18703.3(c)(1).) Commission income is received when paid or credited. (*Id.*)

Under this regulation, a number of distinct parties to a real estate transaction may be sources of income to a real estate agent. (*See* Regulation 18703.3(c)(2)(C).) The regulation provides that the following persons and entities may *all* be sources of income in a real estate sale or similar transaction:

- "(i) The broker and brokerage business entity under whose auspices the agent works;
- "(ii) The person the agent represents in the transaction; and
- "(iii) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker." (*Id.*)

Any and all of the persons or entities referred to in Regulation 18703.3(c)(2)(C) could be sources of income to the Mayor, if they were involved in the transaction that resulted in him receiving \$500 or more in income within 12 months of a decision. Your account of the facts does not identify other sources of income.

Personal Finances.

Mayor Lazar always has an economic interest in his personal finances and those of his immediate family. (Section 87103; Regulation 18703.5; *see* Section 82029 [defining "immediate family" as one's spouse and dependent children].) You have not provided us any information bearing on the personal finances of Mayor Lazar or his immediate family. We therefore do not further discuss possible conflicts based on the Mayor's interest in his personal finances.⁴

Step 4: Are any of The Mayor's Economic Interests Directly or Indirectly Involved in the Governmental Decision?

Once an official identifies an economic interest, he or she must determine whether the economic interest is directly or indirectly involved in a particular governmental decision. (Regulations 18700(b)(4), 18704(a).) Having established the degree of involvement, the official

⁴ You also ask whether the Mayor might have a conflict of interest if he has listed or sold properties in the General Plan areas of interest. Such activities by themselves do not constitute an independent basis for a conflict of interest under the Act. Any purchasers of properties in these areas might, however, be sources of income to the Mayor, who would be barred from taking part in any governmental decision with a reasonably foreseeable material financial effect on the properties now owned by one of those sources of income, because the decision would have its effect on one of the Mayor's sources of income.

can then identify the materiality standard appropriate under the circumstances. (Regulation 18700(b)(5).) There are separate tests applied to real property, sources of income, and an official's economic interest in his or her personal finances, to determine whether an economic interest is directly or indirectly involved in a specific governmental decision.

In analyzing whether a source of income is directly or indirectly involved in a decision before an official's agency, we look to Regulation 18704.1(a), which states in pertinent part:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Thus a source of income is directly involved in a decision before an official's agency when that source of income, directly or by an agent, is a named party in, or is the subject of, a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the source of income. (Regulation 18704.1(a).) If a source of income is not directly involved in a governmental decision, it is deemed to be indirectly involved. (Regulation 18704(a).)

Step 5: Is The Financial Effect Of The Governmental Decision On The Economic Interest Material?

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulations 18700(a), 18705.) Different standards apply to determine whether a financial effect will be material, depending upon the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision under consideration. (Regulation 18705.2, (a) and (b).)

When the source of income is *directly* involved in a governmental decision, Regulation 18705.3(a) provides that “[a]ny... reasonably foreseeable financial effect... is deemed material.” For sources of income that are *not* directly involved, Regulation 18705.3 provides separate materiality thresholds for sources of income that are business entities, non-profit entities, or natural persons.

Because we do not have any information on what, if any, sources of income might be involved in any particular governmental decision, Mayor Lazar must determine for himself

which materiality standard(s) to apply in any given case. We enclose a copy of Regulation 18705.1 to assist this determination.

Step 6: Is The Material Financial Effect Reasonably Foreseeable?

If a *material* financial effect on any economic interest is reasonably foreseeable, a public official will be deemed to have a conflict of interest under the Act. (*See* Regulation 18706.) A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards applicable to the particular economic interest under analysis will be met as a result of the governmental decision. (Regulation 18706(a).) However, a financial effect need not be certain or even substantially likely to be reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.

Regulations 18706(b) and (c) set out a list of non-exclusive elements to consider in determining whether a financial effect is reasonably foreseeable and serve as a general guideline to use in determining whether this standard is met. These subsections provide:

“(b) In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest as defined in subdivision (a) above, the following factors should be considered. These factors are not intended to be an exclusive list of the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines:

“(1) The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;

“(2) The market share held by the official or the official's source of income in the jurisdiction;

“(3) The extent to which the official or the official's source of income has competition for business in the jurisdiction;

“(4) The scope of the governmental decision in question; and

“(5) The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

“(c) Possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable.”

Any relevant factors noted above, along with any other potentially relevant determinants, must be considered for each economic interest involved in a governmental decision. Because this analysis involves a fact-intensive inquiry, and the Commission does not act as a finder of

fact in providing written advice, Mayor Lazar must determine whether or not a material financial effect on his economic interests is reasonably foreseeable in each decision coming before him.

Once those relevant factors are determined, if you need further assistance, we encourage you to provide those factors in seeking further advice.

Steps Seven and Eight: The “Public Generally” and “Legally Required Participation.” Exceptions

A public official will not be disqualified from participating in a governmental decision if a decision would affect the public official's economic interests in a manner indistinguishable from the manner in which the decision would affect “the public generally.” (Section 87103; Regulation 18707(a).) For this exception to apply, the decision must have a financial effect on a “significant segment” of the public in “substantially the same manner” that it would affect the public official. (Regulation 18707.1.)

In rare cases a public official may also, notwithstanding a conflict of interest, be *required* to participate in a governmental decision when there is no alternative source of decision. (Regulation 18708). Because your account of the facts does not suggest that either the “public generally” or the “legally required participation” exceptions might apply to the decisions you describe, we will not go into further detail on their application at this time.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl

Enclosures